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NEW YORK LAW SCHOOL

NYLS Journal of Human Rights

Volume 14
Issue 3 *VOLUME XIV SPRING 1998 PART THREE*

Article 6

Spring 1998

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AN OVERVIEW OF THE LEGAL CHALLENGES FACED BY GAY AND LESBIAN PARENTS: HOW COURTS TREAT THE GROWING NUMBER OF GAY FAMILIES

Erica is an expectant mother. Like many expectant mothers, Erica is filled with excitement. She is preparing the baby's room, picking out names, stocking-up on diapers. She attends Lamaze classes. Erica is thrilled by listening to the baby's heartbeat or feeling it kick. Erica is not pregnant. She has not hired a surrogate mother. Erica is a lesbian. Her life partner, Monique, is carrying the baby that the couple considers their child.[1] Erica and Monique have been together for five years. They own a house together in the suburbs. Erica teaches at a local college; Monique is an attorney.[2]

I. INTRODUCTION

The term "non-traditional family" which once referred only to single-parent and step-parent families, has been expanded to refer to different types of families, including those with one or more gay parent.[3] While there are no concrete numbers available, it is estimated that between six and fourteen million children in the United States have at least one gay parent.[4] The numbers are said to be increasing.[5]

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[1] This note uses the term "gay" to refer to homosexual men or women, "lesbian" to refer to homosexual women, and "life partner" or "partner" to identify the person with whom a gay man or lesbian woman is in a long-term committed relationship.

[2] Erica and Monique are not real; they are a composite of many lesbian parents in the United States; see *infra*, section IIIA.

[3] Elizabeth Delaney, *Statutory Protection of the Other Mother: Legally Recognizing the Relationship Between the Nonbiological Lesbian Parent and Her Child*, 43 HASTINGS L.J. 177, 177 (1991).

[4] Barbara Kantrowitz, *Gay Families Come Out*, NEWSWEEK, Nov. 4, 1996 at 50, 52.; Deidre Larkin Runnette, *Judicial Discretion and the Homosexual Parent: How Montana Courts are and Should be Considering a Parent's Sexual Orientation in Contested Custody Cases*, 57 MONT. L.REV. 177, 180 (1996).

Gay and lesbian families come about in a number of different ways.[6] Historically, most gay and lesbian parents were previously in heterosexual marriages that ended in divorce.[7] After the divorce, these parents often identify themselves as gay or lesbian.

Recently, however, gay and lesbian couples are starting their own families[8] -- in a variety of ways. Some lesbian couples are using artificial insemination to impregnate one of the partners. The sperm may be obtained through a sperm bank,[9] a friend,[10] or a family member of the non-carrying partner.[11] Gay and lesbian couples are adopting children from both the U.S. and foreign countries.[12] Gay men have also hired surrogate mothers.[13]

Research shows that children reared by gay and lesbian parents fair no worse than their peers raised by heterosexual parents.[14] These children are "no more likely to have psychological problems" than children raised by heterosexual parents.[15] Children of gay parents are similar to children of heterosexual parents in terms of intelligence, peer relations,

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[5] Kantrowitz, *supra* note 4, at 52; Delaney, *supra* note 3, at 178 (stating that the increase is due both to the fact that gay and lesbian parents are more open about their status than they were in the past, and that more gay and lesbian couples are choosing to start their own families).

[6] Joseph P. Shapiro & Stephen Gregory, *Kids with Gay Parents*, U.S. NEWS & WORLD REP., Sept., 16, 1996 at 75, 76.

[7] Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and other Non-Traditional Families*, 78 GEO. L.J. 459, 464-65 (1990); Delaney, *supra* note 3, at 177-78.

[8] Polikoff, *supra* note 7, at 466.

[9] *Id.*; Kantrowitz, *supra* note 4, at 52.

[10] Polikoff, *supra* note 7, at 466.

[11] *See, e.g., In re* Tammy, 619 N.E.2d 315 (Mass. 1993).

[12] Polikoff, *supra* note 7, at 466; Kantrowitz, *supra* note 4, at 52.

[13] HAYDEN CURRY ET AL., A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES 3-20 (8th ed. 1994).

[14] Daniel Goleman, *Studies Find No Disadvantage In Growing Up in a Gay Home*, N.Y. TIMES, Dec. 2, 1992 at C14; Shapiro & Gregory, *supra* note 6, at 75. For an excellent review of research in this area see Douglas H. McIntyre, *Gay Parents and Child Custody: A Struggle Under the Legal System*, 12 MEDIATION QUARTERLY 135 (1994).

[15] Goleman, *supra* note 14, at C14.

and development of sexual identity.[16] There are also no differences in sex-role behaviors between children of gay parents and children of heterosexual parents.[17] Furthermore, children of gay parents are no more likely to be gay than are children of heterosexual parents.[18] Despite this research, many courts continue to deny gay and lesbian parents the same rights heterosexual parents have. Many courts presume that an individual is an unfit parent because he or she is gay.[19] This presumption and its effects are manifested in a variety of legal issues faced by gay and lesbian parents.[20]

Gay and lesbian parents previously in heterosexual marriages face challenges to their custody and visitation rights because of their sexuality.[21] If these parents are given custody, they still face problems if later, in a committed relationship they want to protect their family by providing the new partner legal rights to make decisions for the child.[22] Each partner of a gay or lesbian couple that starts a family is not automatically granted equal legal parental status; it is presumed that only one person of each gender can be a child's parent.[23] The mother who carries the child is the only biological, and therefore, legal parent.[24] The father whose name

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[16] Shapiro & *Gregory, supra* note 6, at 75, 76.

[17] McIntyre, *supra* note 14, at 139.

[18] Richard Green, M.D., *The Best Interest of the Child with a Lesbian Mother*, 10 BULL. AMER. ACAD. PSYCH. & L. 8 (1982); Goleman, *supra* note 14, at C14.

[19] *See* G.A. v. D.A., 745 S.W.2d 726 (Mo. Ct. App 1987) (upholding an award of custody to a child's father because of a conclusory presumption that the mother is unfit because she is a lesbian); S.L.H. v. D.B.H., 745 S.W.2d 848 (Mo. Ct. App 1988) (stating that it is in the best interest of the child to place primary custody "with the nonhomosexual parent. . ."). *But see* Nadler v. Superior Court, 63 Cal. Rptr. 352 (Ct. App. 1967) (overturning a custody decision because the trial court had failed to exercise discretion in determining the best interest of child by holding as a matter of law that the child's mother was an unfit parent because she is a lesbian).

[20] *See infra* sections II, III and IV.

[21] *See infra* section II.

[22] *See infra* section III.B.

[23] *See infra* section III.B.

[24] Elizabeth Zuckerman, *Comment, Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother*, 19 U. C. DAVIS L. REV. 729, 730 (1986).

appears on the adoption papers is the child's only legal parent.[25]

This note discusses the legal rights of gay and lesbian families. It analyzes how the law has developed in response to the growing frequency of these "non-traditional" families. Further, this note proposes that while extending to gay and lesbian families the same rights and responsibilities afforded to so-called "traditional" families is in the best interest of the children, courts are not consistently doing this.[26] Part II discusses the rights of gays and lesbians in regard to their own biological children, born out of heterosexual unions.[27] It analyzes challenges made to the parent's custody and visitation rights as made by the non-gay biological parent as well as by a non-parent relative or guardian of the child.[28] This section discusses the two tests courts use in determining how and whether a parent's sexuality effects custody and visitation decisions.[29] Part III discusses the rights of gays and lesbians who wish to adopt.[30] This section addresses both so-called "stranger" adoption, where the adoptive child is not biologically related to either parent, and "second parent" adoptions, where one partner wishes to legally adopt the other partner's biological or previously adopted child.[31] Part IV briefly discusses the custody and visitation concerns that arise when second parent adoptions are not made and the relationship between the partners ends, either through breakup or through the death of one of the partners.[32] Finally, Part V concludes that while many advances have been made in the rights of gays and lesbians, there is still much ground to be covered.[33] Legal rights for gay and lesbian parents are not provided consistently from state to state, and even within each state from issue to issue.[34]

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[25] *Cf. Id.* at 731, 734.
[26] *See infra* sections II, III and IV.
[27] *See infra* section II.
[28] *Id.*
[29] *Id.*
[30] *See infra* section III.
[31] *Id.*
[32] *See infra* section IV.
[33] *See infra* section V.
[34] *Id.*

II. BIOLOGICAL PARENTS - MAINTAINING THE PARENT-CHILD BOND

Research shows that children who maintain a relationship with both parents following the parents' divorce or separation are better adjusted than their peers who do not continue relationships with both parents.[35] When both parents want to maintain custody of or visitation with the child, courts must weigh a variety of factors in deciding how and to whom to award custody and visitation rights.[36] The court's goal is usually defined in terms of seeking to provide for the best interests of the child.[37] Gay and lesbian parents of children from heterosexual unions face many challenges and much discrimination in these battles.[38] They may be presumed unfit because they are gay or lesbian.[39] This section discusses these challenges and how the courts treat the issue of homosexuality of a parent. Issues of custody and visitation are treated separately.

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[35] McIntyre, *supra* note 14, at 135.

[36] PETER N. SWISHER ET AL., FAMILY LAW: CASES, MATERIAL AND PROBLEMS 1040 (1990) (stating that while courts have discussed the factors to be considered in custody decisions, a great deal of deference is given to the trial courts).

[37] Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 628 (1996).

[38] *See generally id.*; David S. Dooley, *Immoral Because They're Bad, Bad Because They're Wrong: Sexual Orientation and Presumptions of Parental Unfitness in Custody Disputes*, 26 CAL. W. L. REV. 395 (1989-1990).

[39] *See supra* note 19 and accompanying text.

A. Parental Custody Decisions

During custody disputes, courts weigh a variety of factors to determine "the best interests of the child."[40] These factors include the home environment that will be provided for the child,[41] the level of care and attention the child receives from the parent,[42] and the amount of time the parent can spend with the child.[43] Also considered are the parent's stability,[44] the closeness of the relationship between the parent and the child,[45] and even the parent's sexual conduct[46] and prior criminal history.[47] In a custody dispute between one gay or lesbian parent and a heterosexual parent, courts are often forced to consider factors not ordinarily before them; for example, one parent may believe that the other parent will not provide a moral upbringing for the child because the one parent believes the other's sexuality is immoral.[48] The non-gay parent may also question the impact the gay parent's sexuality may have on the child's upbringing in terms of potentially exposing the child to ridicule.[49]

Courts generally apply two different tests for determining whether a factor such as a parent's homosexuality is determinative in denying custody to that parent -- the nexus test and the per se rule.

1. *The Nexus Test*

The nexus test requires a clear relationship between a parent's

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[40] SWISHER, *supra* note 36, at 1040.

[41] White v. Thompson, 660 So.2d 1342 (Ala. Civ. App. 1995).

[42] *Id.*

[43] Tucker v. Tucker, 910 P.2d 1209, 1212 (Utah 1996).

[44] *Id.*

[45] *Id.*

[46] *Id.* at 1213. (stating that the plaintiff's sexual conduct is considered by the court in custody disputes).

[47] Ward v. Ward, 1996 W.L. 491692 (Fla. Dist. Ct. of App. 1996) (awarding custody to the heterosexual father despite his criminal record).

[48] S. v. S., 608 S.W.2d 64, 65 (Ky. Ct. App. 1980).

[49] S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987).

homosexuality and harm to the child before custody is denied to the parent on the basis of that factor.[50] Several courts have relied on this test in custody decisions.[51]

The Supreme Court of Alaska actively advocated using this test in *S.N.E. v. R.L.B.*[52] In *S.N.E.*, the court maintained a prior custody decree awarding custody to a lesbian mother, noting that despite overwhelming evidence that the mother is a lesbian, there was no testimony as to a negative effect on the child.[53] Because the mother already had custody of the child, there was insufficient evidence to merit changing that decree.[54]

S.N.E. is an example of the nexus test appropriately applied. In the absence of proof of actual harm or significant potential for harm resulting from a certain factor in this specific case, the court refused to hold such a factor dispositive in its decision.

While the nexus test is generally a good approach, this test has at times been misapplied by courts.[55] The misapplication of this test can be seen in the Kentucky Court of Appeals case, *S. v. S.*[56] The court in *S. v. S.* stated that in order to change the current custody decree from the lesbian mother to the heterosexual father, there must be evidence that the current situation *may* harm the child.[57] The court disagreed with the mother's argument that there must be evidence of *existing* harm to the child.[58] The court based its decision to change the custody decree to the father on testimony given by a psychologist regarding the potential harm to the child from the social stigma of homosexuality in general.[59] There was no

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[50] Shapiro, *supra* note 37, at 636 (stating that the "nexus" test can assist courts in ascertaining the best interests of the child).

[51] *E.g.*, S.N.E. v. R.L.B., 699 P.2d 878 (Alaska 1985); D.H. v. J.H., 418 N.E.2d 286, 292 (Ind. Ct. App. 1981).

[52] 699 P.2d 878.

[53] *Id.* at 879.

[54] *Id.*

[55] Shapiro, *supra* note 37, at 641-42 (stating that due to courts' ongoing speculation and deference, gay and lesbian parents are inevitably harmed in custody disputes).

[56] 608 S.W.2d 64 (Ky. Ct. App. 1980), *cert. denied*, 451 U.S. 911 (1981).

[57] *Id.* at 65.

[58] *Id.*

[59] *Id.* at 66.

discussion as to whether such social stigmatization actually harmed the child, or whether the child in the present case even encountered such stigmatization.[60] In fact, the court-appointed psychologist did not even interview the child.[61] The decision to remove custody from the mother was based on speculation of future social stigmatization without review of the mother's ability to protect the child from such stigmatization.[62] There was no discussion on appeal of any other factors that may influence the custody decision.[63]

The nexus test helps courts determine the appropriate placement of the child. Accordingly, it does not mean that custody is always awarded to the gay or lesbian parent. Rather, when applied appropriately, it means that the fact that a parent is gay or lesbian is irrelevant unless this causes harm to the child.

In a highly-publicized Florida case,[64] the District Court of Appeals awarded custody to a father who had, prior to the birth of the child, spent eight and one-half years in jail for murdering his first wife.[65] The child's mother, with whom the child had resided prior to this decision, was a lesbian.[66] The child, who was eleven years old, had become disruptive and had made what the father had considered inappropriate sexual comments and gestures during visits with the father and his new wife.[67] According to the father, the child stated that the mother and the mother's partner sleep together and do the things shown in the R-rated movies the father would not allow the child to see.[68] The child also undressed a doll she was playing with and placed her fingers between the doll's legs.[69] When she was told that this behavior was not "'nice for little girls to do'" the child

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[60] *Id.*

[61] *S.*, 608 S.W.2d at 65.

[62] *See generally S.*, 608 S.W.2d at 64.

[63] *Id.*

[64] Ward v. Ward, 1996 W.L. 491692 (Fla. Dist. Ct. of App. 1996).

[65] *Id.* at *1.

[66] *Id.*

[67] *Id.* at *2.

[68] *Id.*

[69] 1996 W.L. 491692 at *2.

responded "'I'm not nice.'"[70] Conversely, the mother stated that the child was not aware of the mother's sexual orientation, was not exposed to sexual behavior in the home, and was not permitted to watch R-rated movies.[71]

In upholding the trial court's award of custody to the father, the Court of Appeals stated that the mother's sexual orientation was not the reason for the change in custody.[72] Rather, the decision was based on adverse effects of the child's exposure to inappropriate sexual behavior in general and not that the behavior was of a homosexual nature.[73] It is evident in this case that the child's conduct was improper, likely as a result of adverse effects of her current life situation.[74] The court acknowledged the mother's argument that the evidence was ambiguous, but gave deference to the trial court's review of the conflicting evidence.[75] Here, the court applied the nexus test appropriately.

Applied appropriately, the nexus test requires explicit review of all factors involved in a custody decision. This analysis is truly in the best interest of the child. However, if used incorrectly, the nexus test provides the same result as the per se rule under which evidence of the specific case before the court is not determinative of the result.

2. *The Per Se Rule*

The per se rule either requires or permits the court to presume that a parent is unfit because he or she falls into a certain class of persons: here, homosexuals.[76] By making this presumption, the per se rule denies the parent the opportunity to present evidence that he or she is a suitable parent, and perhaps the better custodial parent. Furthermore, the court does not in turn examine if the parent who is not a member of the defined

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[70] *Id.*

[71] *Id.*

[72] *Id.* at *3.

[73] *Id.*

[74] 1996 W.L. 491692 at *3.

[75] *Id.*

[76] Shapiro, *supra* note 37, at 637.

class is a fit parent. This creates the possibility that custody could be awarded to a heterosexual parent who is truly unfit, possibly even abusive, because custody is denied to the other parent, who is gay. The per se rule cannot be in the best interest of the child because it fails, by definition, to consider any of the other factors typically involved in custody decisions.[77] This rule, while overlooking the specifics of a situation and making judgments against a class of people, has been disguised as making decisions "in the best interest of the child."[78]

Courts in Missouri apply the per se rule in denying custody to gay or lesbian parents.[79] The first in a line of Missouri cases is *S.E.G. v. R.A.G.*, in which the Missouri Court of Appeals rejected the mother's request for application of the nexus test.[80] The court stated that the equal treatment of parents in a custody decision ends if there is evidence that the child will be harmed if placed with one of the parents.[81] In saying this, the court appeared to advocate use of the nexus test, requiring that there be evidence of harm to the child, and a cause/effect relationship between the harm to the child and the behavior of a parent in order to deny custody to that parent.[82] However, rather than identify the harm to the child and the relationship between this harm and the mother's behavior, the court implied the presence of harm based solely on the fact that the mother was a lesbian and that the mother lived in a small community where the court says "[h]omosexuality is not openly accepted or widespread"; thus applying a per se rule.[83] The court stated that it wanted to protect the children from the stigmatization that may occur because of the mother's lifestyle but had not proof that such stigmatization would occur.[84]

In a subsequent Missouri case, *G.A. v. D.A.*,[85] the Missouri Court

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[77] Dooley, *supra* note 38, at 404.

[78] *Id.*

[79] *E.g.*, G.A. v. D.A., 745 S.W.2d 726 (Mo. Ct. App. 1987).

[80] S.E.G. v. R.A.G., 735 S.W.2d 164 (Mo. Ct. App. 1987).

[81] *Id.* at 166.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] 745 S.W.2d 726 (Mo. Ct. App. 1987).

of Appeals stated that it agreed with the reasoning of *S.E.G.*, "that a court cannot ignore the effect which the sexual conduct of a parent may have on a child's moral development."[86] On appeal, the court addressed only two issues, the quality of housing available to the child and the mother's sexual orientation.[87] After discussing the issue of housing at great length,[88] the court acknowledged that the welfare of the child goes beyond the child's physical surroundings, implying that this analysis was of no value.[89] The court then upheld the trial court's award of custody to the father based solely on the mother's sexual orientation without discussion of actual harm to the child.[90]

The danger of the attempted abuse of the per se rule by one parent against the other can be seen in a subsequent Missouri case.[91] In *S.L.H. v. B.D.H.*[92] a disgruntled father accused his wife of being a lesbian in order to deny her custody of their child.[93] Prior to the divorce proceedings, he had threatened that he would do whatever it took to get even with her, including accusing her of having a lesbian relationship.[94] The mother and her alleged partner, a childhood friend, vehemently denied the accusations.[95] The court stated that although "placing primary custody of a minor child with the non-homosexual parent is in the best interests of the child," the trial court weighed the evidence and its credibility and had determined that the wife was not a lesbian.[96] Custody was awarded to the

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[86] *Id.* at 728.

[87] *Id.*

[88] *Id* at 727. The court stated that at the time of the trial, the mother was living in a three bedroom house, where the child would have his own room. *Id.* If custody was awarded to the father, the boy would have had to live temporarily in his paternal grandparent's trailer while construction was done on the father's trailer to add a room for the boy. *Id.*

[89] *G.A.*, 745 S.W.2d at 728.

[90] *Id.*

[91] S.L.H. v. D.B.H., 745 S.W.2d 848 (Mo. Ct. App. 1988).

[92] *Id.*

[93] *Id.* at 849.

[94] *Id.*

[95] *Id.*

[96] *S.L.H.*, 745 S.W.2d at 849.

mother[97] and the potential abuse of the per se rule was avoided in this case.

On occasion, a trial court's use of the per se rule has bee rejected on appeal. In *Doe v. Doe*[98] the Supreme Court of Virginia overturned a custody hearing that had applied the per se rule in denying custody to a child's lesbian mother.[99] The father relied on a Virginia statute that criminalized homosexual sex.[100] The court rejected the idea that the mother's participation in this activity made her per se unfit.[101] The court analogized this idea to one it considered illogical, where every individual who has had a criminal conviction is presumed an unfit parent.[102]

Arguably, there is some basis for the idea that an individual who has committed a felony, thereby putting his or her own life at risk, and actively causing harm to society, will not be able to provide a safe and appropriate setting in which to raise a child. Certainly harm to the child is more likely to arise here than from a parent's private sexual behavior; however, states are inconsistent about application of the per se rule against persons with prior criminal convictions.[103] While some states require that parental rights be terminated if a parent has been convicted of a felony, most states treat "conviction of the felony and imprisonment [as] one factor to determine whether or not the parent is unfit . . . ."[104]

Absent conclusive evidence that gays and lesbians are uniformly unfit parents, and bearing in mind that gays and lesbians are as diverse a group of individuals as are heterosexuals, a rule that presumes that all members of such group are unfit parents cannot be appropriate. Many

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[97] *Id.* at 850.

[98] 284 S.E.2d 799 (Va. 1981).

[99] *Id.* at 805-06.

[100] *Id.* at 805.

[101] *Id.* at 806.

[102] *Id.*

[103] Joseph R. Carrieri, *Termination of Parental Rights and Proceedings, in* CHILD ABUSE, NEGLECT AND THE FOSTER CARE SYSTEM 1996, at 9, 151 (PLI Litig. & Admin. Practice Course Handbook Series No. 173, 1996).

[104] *Id* at 151-152.

states acknowledge this diversity in their application of the nexus test,[105] and all states should require a showing of harm before ruling that one parent is unfit.

There is no clear rule as to how a parent's homosexuality can affect a custody hearing, and courts have been inconsistent in their application of the rules. While there has been no definitive word as to what is best, the United States Supreme Court has ruled on a similar issue that courts should apply in these cases. In *Palmore v. Sidoti,*[106] race and not sexuality was the issue.[107] In *Palmore*, following a divorce between a white couple, the mother was awarded custody of the couple's child.[108] The mother subsequently lived with and later married a black man.[109] The Florida District Court affirmed the trial court's change of custody to the father because it was in the best interest of the child to protect the child from the stigmatization that may ensue if the child is raised by a racially mixed couple.[110] The United States Supreme Court overturned that decision, stating that the trial court was giving in to society's private bias.[111] The Court commented that "[t]he Constitution cannot control such prejudices but neither can it tolerate them."[112] Because it involved racial classifications, the custody decision in *Palmore* was subject to strict scrutiny.[113] Gays and lesbians are not treated as a suspect class for purposes of discrimination and therefore cases decided based on classification by sexual orientation are not given a strict scrutiny level of review.[114] However, as in *Palmore*, many cases regarding gay and lesbian parents are decided based on potential for stigmatization of the child.

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[105] *E.g.*, S.N.E. v. R.L.B., 699 P.2d 878 (Alaska 1985); D.H. v. J.H., 418 N.E.2d 286, 293 (Ind. Ct. App. 1981).

[106] 466 U.S. 429 (1984).

[107] *Id* at 430.

[108] *Id.*

[109] *Id.*

[110] *Id.* at 431.

[111] *Palmore*, 466 U.S. at 433.

[112] *Id.*

[113] *Id.*

[114] Dooley, *supra* note 38, at 399.

While it is not controlling, states should apply the principle established in *Palmore* and reject custody challenges based on the private biases of the parents and society. As the New Jersey Superior Court noted in *M.P. v. S. P.*,[115] awarding custody to the heterosexual parent will not change the fact that the child has a gay or lesbian parent.[116] The child will have to live with and deal with this fact regardless of where he or she lives; therefore, this should not be a determinative factor in deciding custody cases.

B. Non-Parent Custody

In a small number of cases, custody of a child who has a gay or lesbian parent has been sought by someone other than the child's parent.[117] The custody-seeking individuals have been other family members and guardians who are opposed to having the child raised by the homosexual parent.[118] The challenge for these persons to obtain custody is greater than that for a parent seeking custody.[119] Courts presume that it is in the best interest of the child to be with a parent.[120] The person petitioning for a change in custody in these cases must overcome the burden of this presumption and show, by clear and convincing evidence that the parent is unfit.[121] Some courts have applied this burden very strictly and in line with a nexus test.[122] As discussed below, other courts have allowed the petitioners to overcome this burden without a clear showing of a

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[115] 404 A.2d 1256 (1979).

[116] *Id.* at 1262.

[117] *E.g.*, Bottoms v. Bottoms, 457 S.E.2d 102 (Va. 1995); White v. Thompson, 569 So.2d 1181 (Miss. 1990); Bezio v. Patenaude, 410 N.E.2d 1207 (Mass. 1980); Hembree v. Hembree, 660 So.2d 1342 (Ala. Civ. App. 1995).

[118] *Bottoms*, 457 S.E.2d 102 (stating that grandparents are seeking custody); *White*, 569 So.2d 1181 (grandparents); *Bezio*, 410 N.E.2d 1207 (guardian); *Hembree*, 660 So.2d 1342 (grandparents).

[119] *Hembree*, 660 So.2d at 1344.

[120] *Bottoms*, 457 S.E.2d at 104.

[121] *Id.*

[122] *E.g.*, *Bezio*, 410 N.E.2d 1207; *Hembree*, 660 So.2d 1342.

relationship between the parent's behavior and harm to the child.[123]

Bottoms v. Bottoms[124] was a highly publicized Virginia case in which custody was ultimately awarded to the child's maternal grandmother.[125] The grandmother petitioned for custody two weeks after the child's mother told her that she was a lesbian.[126] The trial court awarded custody to the grandmother because the mother's homosexual conduct was illegal in Virginia and because the trial judge believed the mother's behavior to be immoral.[127] A unanimous Virginia Court of Appeals overturned the trial court's decision stating that there was no proof of harm to the child.[128] The Virginia Court of Appeals' decision was later overturned by the Supreme Court of Virginia.[129] The state Supreme Court stated that the Court of Appeals "failed to give proper deference . . . to the trial court's factual findings."[130] The court found proof of harm to the child by the mother's conduct because the child, aged three, screamed, seemed confused about discipline, and used foul language.[131] The court did not compare this behavior to that of a typical child of similar age.[132] The court also based its decision on the "social condemnation" a child living with a lesbian parent may encounter.[133]

Despite conflicting evidence and a trial court decision that the trial judge clearly states includes his own biases, the Supreme Court of Virginia gave deference to the findings of the trial court.[134] The child's grandmother was able to overcome the higher burden of persuasion placed on a non-parent seeking custody although the "proof of harm" was vague

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[123] *E.g.,Bottoms*, 457 S.E.2d 102; *see infra* note 135 and accompanying text.

[124] 457 S.E.2d 102.

[125] *Id* at 109.

[126] *A Case of Justice Gone Badly Awry, Editorial*, CHI. TRIB., May 6, 1995, at 20.

[127] *Bottoms*, 457 S.E.2d 102, 109 (Keenan, J., dissenting).

[128] 444 S.E.2d 276, 283-84 (1994).

[129] *Bottoms*, 457 S.E.2d 102, 109.

[130] *Id.* at 107.

[131] *Id.* at 108.

[132] *Id.*

[133] *Id.*

[134] *Bottoms*, 457 S.E.2d at 105.

and not clearly associated with the actions of the mother.[135] This burden should be applied under a nexus test, wherein the behavior of the parent must be proven to harm the child.

C. Visitation

When custody is awarded to the non-homosexual parent or non-parent, on whatever basis, questions still arise regarding the extent and type of visitation to be awarded to the homosexual parent. In general, absent a showing of harm from the noncustodial parent, courts advocate awarding very liberal visitation rights because it is in the best interest of the child to develop and maintain a relationship with both parents.[136] Courts can restrict visitation in a variety of ways, such as allowing in-home visitation only,[137] daytime visitation only,[138] and visitation only in the absence of certain person(s).[139] For many gay and lesbian noncustodial parents, the question of harm becomes an important one. A number of cases address situations where the custodial parent has attempted to restrict visitation with the noncustodial parent because he or she is gay.[140] As in issues of custody, courts are divided as to whether the harm to the child must be proven or is presumed.[141]

States that have refused to presume harm to the child from

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[135] Id. at 107.

[136] *Roberts*, 489 N.E. at 1069; McIntyre, *supra* note 14, at 135.

[137] *E.g.*, Conkel v. Conkel, 509 N.E.2d 983 (Ohio Ct. App. 1987).

[138] *E.g.*, *In re* J.S. & C., 362 A.2d 54 (N.J. Sup. Ct. App. Div. 1976).

[139] *E.g.*, *In re* Walsh, 451 N.W.2d 492 (Iowa 1990); Roberts v. Roberts, 489 N.E.2d 1067 (Ohio Ct. App. 1985).

[140] *E.g.*, J.P. v. P.W., 772 S.W.2d 786 (Mo. Ct. App. 1989); *In re* J.S. & C., 362 A.2d 54 (N.J. Sup. Ct. App. Div. 1976); Conkel v. Conkel, 509 N.E.2d 984 (Ohio Ct. App. 1987); Hertzler v. Hertzler, 908 P.2d 946 (Wyo. 1995).

[141] *E.g.*, *In re* R.E.W., 471 S.E.2d 6 (Ga. Ct. App. 1996), *reh'g denied*, 472 S.E.2d 295 (Ga 1992) (refusing to alter visitation decree based on father's homosexuality absent a showing of harm to the child); J.P. v. P.W., 772 S.W.2d 792 (Mo. Ct. App. 1989) (acknowledging that some states require a showing of harm to the child in order to restrict or deny visitation, but stating that the law of Missouri is not as such and upholding restrictions to a visitation decree because of father's homosexuality).

unsupervised visitation with the gay parent include Georgia.[142] In a recent Georgia Court of Appeals decision,[143] the court held that because there was no showing of harm from visits with the gay father, unrestricted visits should be permitted as they would enhance the relationship between the father and the child.[144] The child's heterosexual mother appealed this decision to the Supreme Court of Georgia, but that court denied certiorari.[145]

There is a presumption by some courts that it is best for a child not to know that a parent is gay or lesbian.[146] The Ohio Court of Appeals held in *Roberts v. Roberts*[147] that a father should be barred from telling his children that he is gay and from being in the presence of unrelated males during visitation with the child.[148] The trial court had refused to impose these restrictions and the mother appealed.[149] The father agreed that he would not tell his children that he is gay, but stated that if asked, he could not lie to them.[150] The Ohio Court of Appeals remanded the case with instructions that if the trial court was not able to adequately safeguard against the children learning of their father's sexual orientation, then visitation should be terminated.[151]

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[142] *See In re* R.E.W., 471 S.E.2d 6 (Ga. Ct. App. 1996), *reh'g denied*, 472 S.E.2d 295 (Ga 1992); *see also* Conkel v. Conkel, 509 N.E.2d 983 (Ohio Ct. App. 1987); *In re* Ashling, 599 P.2d 475 (Or. Ct. App. 1979); *In re* Cabalquinto, 669 P.2d 886 (Wash. 1983); Hertzler v. Hertzler, 908 P.2d 946 (Wyo. 1995). *But see In re* Walsh, 451 N.W.2d 492 (Iowa 1990); J.P. v. P.W., 772 S.W.2d 786 (Mo. Ct. App. 1989); *In re* J.S. & C., 362 A.2d 54 (N.J. Sup. Ct. App. Div. 1976); Roberts v. Roberts, 489 N.E.2d 1067 (Ohio Ct. App. 1985).

[143] *In re* R.E.W., 471 S.E.2d 6 (Ga. Ct. App. 1996), *reh'g denied*, 472 S.E.2d 295 (Ga 1992).

[144] *Id.* at 9.

[145] *In re* R.E.W., 472 S.E.2d 295 (Ga. 1996), *reh'g denied*, 472 S.E.2d 295 (Ga 1992).

[146] *E.g.*, J.P. v. P.W., 772 S.W.2d 794 (Mo. Ct. App. 1989); *Roberts*, 489 N.E.2d 1067.

[147] 489 N.E.2d 1067 (Ohio Ct. App. 1985).

[148] *Roberts*, 489 N.E.2d at 1070.

[149] *Id.*

[150] *Id.* at 1069.

[151] *Id.* at 1070.

The Missouri Court of Appeals cited *Roberts* in its decision is *J.P. v. P.W.*[152] In *J.P.*, the court permitted a mother's request to modify a custody decree, restricting visitation with the father to exclude the presence of any unrelated males. The court acknowledged that some states do apply the nexus test to custody and visitation proceedings, but stated that this is not the law of Missouri.[153] The court further held that expert testimony is not needed to prove that exposure to gay lifestyle will harm the child.[154] The court based its decision to modify the visitation on the fact that the father was open in front of the child about his relationship with another man and that the child's behavior changed after she returned from a visit with her father.[155] The court assumed that the change in the child's behavior was because of the father's sexual orientation and did not consider any other explanations.[156]

Custody and visitation battles arise from disagreements between the parents as to what is best, or even appropriate for the children. Few disagreements have been as great as that encountered in *Hertzler v. Hertzler*.[157] After their divorce, the parents' lifestyles took completely divergent paths. The mother became involved in a lesbian relationship and became very active in the gay rights movement.[158] The father married a woman with strong fundamentalist Christian values.[159] The children were originally placed in physical custody with the mother.[160] This custody agreement was contingent on the mother refraining from homosexual relationships, so the custody was changed to the father after the mother began her relationship with her lesbian partner.[161] Later, because the father and step-mother had concerns over the children's involvement in various

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[152] *J.P.*, 772 S.W.2d at 792.
[153] *Id.*
[154] *Id.* at 793.
[155] *Id.*
[156] *Id.*
[157] 908 P.2d 946 (Wyo. 1996).
[158] *Id.* at 949.
[159] *Id.*
[160] *Id.* at 948.
[161] *Id.*

aspects of the mother's lifestyle -- including gay pride rallies and a commitment ceremony -- the father sought and was awarded a modification of the visitation decree to restrict the visits.[162] The mother appealed the decision and the Supreme Court of Wyoming upheld the restrictions on visitation.[163] The court noted that its decision was made not because of the father and step-mother's view of the mother's lifestyle as aberrant, but rather because it feared harm to the children because of confusion of the divergent lifestyles.[164]

Visitation decrees must carefully balance the need for development and maintenance of the relationships among the parties with concerns over the child's confusion regarding the arguably conflicting lifestyles of the two parents. While many courts advocate that the child's best interest is served if the parent does not disclose his or her sexual orientation, this view must be questioned. While there is no firm research as to whether it is better for the child to know, there are many questions regarding the wisdom of this secrecy. The parent may be compelled to lie to the child. The child may find or figure this out on his or her own, and may resent the parent's secrecy. There is research that shows that if the gay parent wishes to disclose his or her sexual orientation to the child, it is best to tell the child about a parent's sexuality either in early childhood or in late adolescence.[165] This is much easier to control if the parent is open with the child.

III. ADOPTION - CREATING A LEGAL PARENT-CHILD RELATIONSHIP

Gays and lesbians encounter adoption proceedings in two different ways - - by seeking to adopt a child not related to the party adopting (so-

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[162] *Hertzler*, 908 P.2d at 949 (stating that the visitations were "severely" restricted; that visitation with the mother was at a "de minimis level").

[163] *Id* at 949-52.

[164] *Id*. at 952.

[165] Kantrowitz, *supra* note 4, at 57 (stating that in early adolescence, children "are struggling with their own issues of sexual identity," and therefore are more susceptible to difficulty accepting this news about the parent).

called "stranger adoptions")[166] or through second-parent adoptions,[167] where one person seeks to adopt the biological or already-adopted child of his or her life partner.[168] Each of these adoptions carries with it different legal issues and so is addressed separately below.

A. Stranger Adoptions

One way for gay men or lesbian women to start a family is by adoption.[169] Many men[170] not presently in relationships seek to adopt as single parents,[171] while some couples decide to adopt together.[172] Thirteen states have explicitly allowed adoption by homosexuals.[173] While many other states do not specifically bar gays and lesbians from adopting, gays and lesbians have encountered challenges to adoptions. Only two states, Florida and New Hampshire, have provisions in their adoption statutes explicitly denying homosexuals the ability to adopt.[174] As with custody issues, absent conclusive evidence that gays and lesbians are unfit parents, and based on substantial evidence to the contrary, gays and lesbians should have the right to have their adoption applications reviewed on an individual basis. Many states have provided this right.[175]

In a challenge to an adoption proceeding by a gay man,[176] the Ohio Supreme Court overturned a state Court of Appeals decision that held "as

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[166] William E. Adams, Jr., *Whose Family is it Anyway? The Continuing Struggle for Lesbians and Gay Men Seeking to Adopt Children*, 30 NEW ENG. L. REV. 579, 588-89 (1996).

[167] Zuckerman, *supra* note 24 at 729.

[168] *Id.*,

[169] Kantrowitz, *supra* note 4, at 52.

[170] Because the case law on this issue deals mostly with men seeking to adopt, this section refers to the adoptive parents as males.

[171] David W. Dunlap, *Gay Parents Ease into Suburbia: For the First Generation, Car Pools and Soccer Games*, N.Y. TIMES, May 16, 1996, at C1; *e.g. In re* Charles B., 552 N.E.2d 884 (Ohio 1990).

[172] Kantrowitz, *supra* note 4, at 54.

[173] *Id.* at 52.

[174] FL. STAT. ANN. § 63.042(3) (West 1985); N.H. REV. STAT. ANN § 170-B:4 (1994).

[175] Kantrowitz, *supra* note 4, at 54.

[176] *In re* Charles B., 552 N.E.2d 884 (Ohio 1990).

a matter of law, homosexuals are not eligible to adopt."[177] The adoption in *In re Charles B.* was challenged by the county Department of Human Services.[178] The prospective parent in this case was a psychologist who had counseled the adoptive child, an eight-year-old boy with leukemia, a speech disorder, and possible brain damage.[179] According to the state supreme court's review of the record, the prospective parent, a gay man, had "been the one consistent and caring person in the [child's] life."[180] The Ohio Supreme Court rejected the court of appeals' decision that gays and lesbians are not eligible to adopt as a matter of law and held that adoptions should be examined on a case-by-case basis.[181] Since the trial court had determined that the adoption was in the child's best interest, the adoption was permitted.[182]

In a recent landmark New Jersey case, a judge permitted the joint adoption of a two-year-old boy by two gay men.[183] Prior to this decision, only married couples could adopt jointly in New Jersey; all others had to petition separately.[184] This decision eliminated the added cost and delay for the petitioner and promoted judicial economy.[185]

As stated previously, Florida and New Hampshire have specific provisions in their adoption statutes prohibiting gays and lesbians from adopting. A challenge to the Florida statute[186] prohibiting adoption by

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[177] *Id.* at 885.

[178] *Id.* at 884.

[179] *Id.* at 884-85.

[180] *Id.* at 885.

[181] 552 N.E.2d at 886.

[182] *Id.* at 889-90.

[183] Ronald Smothers, *Court Lets Two Gay Men Jointly Adopt Child*, N.Y. TIMES, Oct. 23, 1997, at B5 (stating that the couple has raised the child since he was three months old); Matthew Futterman, *2 Men and a Baby, Legally*, STAR LEDGER, Oct. 23, 1997, at 1, 56; Ruth Padawer, *Victory for Gay Couple -- Judge Sidesteps DYFS Rule to Allow Adoption*, REC., Oct. 23, 1997, at A1, A16 (stating that "[o]fficials with the state Division of Youth and Family Services have never questioned whether the two men. . . should be the boy's parents").

[184] *See* Smothers, *supra* note 183, at B5.

[185] *Id.*

[186] FL. STAT. ANN. § 63.042(3) (West 1985).

homosexuals upheld the law as constitutional.[187] In *State of Florida Department of Health and Rehabilitative Services v. Cox*,[188] two gay men openly disclosed their sexual orientation to representatives of the Florida Department of Health and Rehabilitative Services.[189] The trial court, relying on a recent Florida circuit court case, *Seebol v. Farie*,[190] held that the law "is void for vagueness and that it violates homosexuals' rights to privacy and equal protection."[191] On appeal, the District Court of Appeal of Florida overturned the trial court's ruling, addressing each of these issues as well as a challenge to due process.[192] In support of its ruling, the court made reference to a New Hampshire opinion on the constitutionality of that state's law restricting adoption by homosexuals.[193] The decision of the Florida District Court was appealed to the Florida Supreme Court.[194] The Florida Supreme Court upheld each of the District Court's holdings with the exception of the Equal Protection challenge which it remanded for further analysis.[195] The New Hampshire Supreme Court addressed the same issues, and also discussed the right of freedom of association as related to the statute in question.[196] Each of the issues addressed by the Florida District Court and the New Hampshire Supreme Court is analyzed below.

1. *Vagueness*

In *Cox*, the issue of unconstitutional vagueness was raised by the

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[187] State of Florida Dep't of Health and Rehabilitative Servs. v. Cox, 627 So.2d 1210 (Fla. Dist. Ct. App. 1993).

[188] *Id.*

[189] *Id.* at 1212

[190] 16 Fla. L. Weekly c52 (Fla. Cir. Ct. 1991) (appendix A to *Cox*, 627 So.2d 1210).

[191] *Cox*, 627 So.2d at 1212.

[192] *Id.* at 1212-13.

[193] *Id.* at 1214 (citing to *In re* Opinion of the Justices, 530 A.2d 21 (N.H. 1987)).

[194] Cox v. State of Florida Dep't of Health and Rehabilitative Servs., 656 So.2d 902 (Fla. 1995).

[195] *Id.* at 903.

[196] *In re Opinion of Justices*, 530 A.2d at 27.

trial court and not by the plaintiffs.[197] On appeal, the district court acknowledged that the statute restricting adoption by a homosexual "does not define 'homosexual,'"[198] but agreed with the appellant that the statute can be interpreted as applying the definition used in New Hampshire.[199] The Supreme Court of New Hampshire held constitutional a bill that defined a homosexual as a person who has engaged in voluntary sexual acts with a person of the same gender "reasonably close in time to the filing of . . . a petition for adoption."[200] The Florida District Court concluded that the rule in question was constitutional and did not concern "a person's thoughts, but rather a person's conduct."[201]

2. *Right to Privacy/ Freedom of Association*

Both the New Hampshire court and Florida District Court upheld the statutes against challenges to a constitutionally guaranteed right to privacy.[202] The Florida District Court maintained that because the adoption statutes are designed to benefit the best interest of the child in question, the State of Florida Department of Health and Rehabilitative Services (H.R.S.) has a right to examine the background of the prospective parent.[203] The court also pointed out that the appellees volunteered the information about their sexual orientation.[204] The court commented that "[t]hey cannot claim an expectation of privacy concerning a fact that they have willingly disclosed."[205] The appellees did not object to having H.R.S. inquire about or know their sexual orientation.[206] Rather, they believed that such information should be treated as one of several factors used in reviewing

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[197] *Cox*, 627 So.2d at 1214.
[198] *Id.* at 1213.
[199] *Id.* at 1214.
[200] *In re Opinion of Justices*, 530 A.2d at 24.
[201] *Cox*, 627 So.2d at 1214.
[202] *Id.* at 1215-16; *In re Opinion of Justices*, 530 A.2d at 27.
[203] *Cox*, 627 So.2d at 1216.
[204] *Id.* at 1215.
[205] *Id.*
[206] *Id.*

the adoption application rather than a decisive factor.[207] In addressing the privacy issue, the New Hampshire court based its decision on *Bowers v. Hardwick*,[208] a United States Supreme Court case that upheld the constitutionality of a Georgia state law criminalizing consensual sodomy.[209] The New Hampshire court viewed this case as denying a right to participate in homosexual sodomy, but acknowledged that an investigation into this behavior could occur only after an individual has applied to become a foster or adoptive parent.[210] That court applied a similar analysis to the question of right of freedom of association.[211]

3. *Equal Protection*

In determining whether the adoption statutes violate homosexuals' right to equal protection under the Constitution, both courts determined that homosexuals are not afforded protection under two approaches to the issue of Equal Protection - a strict scrutiny basis and a rational basis standard.[212] As for the strict scrutiny approach, the Florida District Court explained that this applies only if the parties are members of a suspect class.[213] The court cited several cases in which courts had failed to identify sexual orientation as a basis for defining a suspect class and therefore refused to extend that status in the present case.[214] The New Hampshire court also concluded that homosexuals do not represent a suspect class but gave no support for its determination.[215] As to the "rational basis" analysis, both courts reasoned that because the state has a responsibility to provide the best possible environment for adoptive children, the decision to exclude homosexuals from the pool of adoptive parents is part of a

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[207] *Id.*

[208] 478 U.S. 186 (1986).

[209] *Id.*

[210] *In re Opinion of Justices*, 530 A.2d at 27

[211] *Id.*

[212] *Cox*, 627 So.2d at 1218-19; *In re Opinion of Justices*, 530 A.2d at 24.

[213] *Cox*, 627 So.2d at 1218; *In re Opinion of Justices*, 530 A.2d at 24.

[214] *E.g.*, Evans v. Romer, 854 P.2d 1270 (Colo. 1993).

[215] *In re Opinion of Justices*, 530 A.2d at 24.

legitimate purpose and therefore proper.[216] The New Hampshire court stated that the exclusion is in advancement of the state's goal of avoiding the "'social and psychological complexities' which living in a homosexual environment could produce. . . ."[217] The Florida District Court justified its decision on the theory that because most children will grow up to be heterosexual, it is in the best interest of all children to be raised by heterosexuals who can teach the children how to relate to the opposite sex.[218] It was this analysis that the Florida Supreme Court rejected on appeal and remanded for further discussion.[219]

4. *Due Process*

The United States Constitution, the New Hampshire Constitution, and the Florida Constitution each state that a person may not be deprived of "life, liberty or property" without due process of the law.[220] Both courts overcame this challenge by stating that adoption is not a fundamental liberty.[221] It was here that the Florida court pointed to the *Bowers* case, stating that participation in homosexual acts is not a fundamental right.[222]

5. *Summary*

These two states have denied the right to adopt to a set of persons based solely on their sexual orientation. No right has been afforded to homosexuals to have their suitability analyzed on an individual basis. Their income level, educational background, home life, and potential love and emotional support for the child did not matter in terms of the state's view of their ability to parent. Without evidence showing that gay and lesbian are unfit parents it is not appropriate for the states to discriminate

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[216] *Cox*, 627 So.2d at 1220; *In re Opinion of Justices*, 530 A.2d at 24.

[217] *In re Opinion of Justices*, 530 A.2d at 24 (quoting from House Resolution 32).

[218] *Cox*, 627 So.2d at 1220.

[219] *Cox*, 656 So.2d at 903.

[220] U.S. Const. amend, XIV; N.H. Const. pt. I, art 15; Fla. Const. Art I § 9.

[221] *Cox*, 627 So.2d at 1217; *In re Opinion of Justices*, 530 A.2d at 26.

[222] *Cox*, 627 So.2d at 1217-18.

against this class of individuals. These states are stereotyping gay and lesbians, that is, they are making an unsupported correlation between sexual orientation and the ability to parent. Gay and lesbian individuals should be afforded the right to be considered as adoptive parents. The forty-eight other states in the United States have not restricted this right.

B. Second-Parent Adoptions

Two people who are not married decide to have a child. When the child is born to one of them, is each of these people the child's parent?[223] If the couple is heterosexual, both may be biological parents, and they can marry to protect their legal binds to the child.[224] If this is a lesbian couple, only one woman is the biological and legal parent of the child.[225]

Current adoption statutes do not provide a way for unmarried couples to protect the legal interests of each parent toward a child and vice versa.[226] Most statutes provide that if a child is to be adopted, the legal rights of the biological parents must be terminated. The one standing exception to this rule is stepparent adoption, whereby the spouse of the legal parent may adopt the child, with the consent of the legal parent, without termination of one legal parent's rights.[227] However, if the child has two legal parents, the non-custodial parent must relinquish parental rights in order for a stepparent to adopt.[228] These statutes fail to protect children who are being raised by two people (one of whom is not the child's biological parent) who are in a lifetime relationship, but are not married. The couple may not be married either because they choose not to be, or because, as with gay or lesbian couples, the state refuses to recognize their marriage.

The purpose of seeking legal parent status is many-fold. It serves

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[223] Zuckerman, *supra* note 24, at 729.

[224] *Id.* at 730-31.

[225] *Id.*; *see also* Titchenal v. Dexter, 693 A.2d 682 (Vt. 1997).

[226] Emily C. Patt, *When Crossing the Marital Barrier Is in a Child's Best Interests*, 3 BERKELEY WOMEN'S L.J. 96, 96 (1987).

[227] *Id.* at 97.

[228] Polikoff, *supra* note 7, at 476.

the child by conferring legal responsibility on the parent to support the child.[229] It allows the parent to make medical decisions for the child.[230] It entitles the child to inherit from the parent as well as to receive social security benefits.[231] It provides for continuity in the child's life as the legal parent has standing to petition for adoption or custody in the event of termination of the relationship between the parents.[232]

There have been many challenges to these adoption statutes in the interest of protecting the legal rights and responsibilities of gay and lesbian co-parents.[233] While some courts have refused to extend adoption rights to second-parents,[234] others have permitted the extension of rights.[235] Courts have acknowledged that they are addressing issues that were not in the minds of the legislature when the adoption statutes were created.[236]

Many courts have been willing to extend second-parent adoption rights to same sex life partners. Of particular interest is the New York Court of Appeals case, *In re Jacob & In re Dana* in where a four-three panel granted second parent adoption rights to non-married heterosexual couples as well as homosexual couples.[237] At the time of the decision in *In re Jacob*, several lower courts had inconsistently addressed this same issue.[238] The Court of Appeals stated that the New York adoption statute[239]

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[229] *In re* Jacob, 660 N.E.2d 397, 399 (N.Y. 1995).

[230] *Id.*

[231] *Id.*; Delaney, *supra* note 3, at 179; Zuckerman, *supra* note 24, at 742.

[232] *In re Jacob*, 660 N.E.2d at 399; see also *infra* section IV.

[233] *E.g., In re* Angel Lace M., 516 N.W.2d 678 (Wisc. 1994); *In re* T.K.J. & K.A.K., 931 P.2d 488 (Colo. Ct. App. 1996); *In re* Tammy, 619 N.E. 2d 315 (Mass. 1993); *In re* B.L.V.B. and E.L.V.B., 628 A.2d 1271 (Vt. 1993); *In re* Two Children by H.N.R., 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995).

[234] *E.g., In re* Angel Lace M., 516 N.W.2d 678 (Wisc. 1994); *In re* T.K.J. & K.A.K., 931 P.2d 488 (Colo. Ct. App. 1996).

[235] *In re* Tammy, 619 N.E. 2d 315 (Mass. 1993); *In re* B.L.V.B. and E.L.V.B., 628 A.2d 1271 (Vt. 1993); *In re* Two Children by H.N.R., 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995).

[236] *E.g., In re B.L.V.B.*, 628 A.2d at 1273 (Vt. 1993).

[237] *In re* Jacob & *In re* Dana, 660 N.E.2d 397 (N.Y. 1995).

[238] *E.g., In re Dana*, 624 N.Y.S.2d 634 (App. Div. 1995); *In re* Camilla, 620 N.Y.S.2d 897 (Fam. Ct. 1994) (stating that stepparent exemption to termination of parental rights applied to allow second parent adoption); *In re* Evan, 583 N.Y.S.2d 997 (Surr. Ct.

should be strictly construed, within the legislative intent of the statute and with the goal of "securing the best possible home for a child."[240]

Furthermore, the court mentioned the fact that the statute was last consolidated in 1938, and thus held that there were inconsistencies that may be difficult to sort out.[241] Such ambiguities, the court stated, are to be resolved in favor of the child.[242] As to whether the legal parent's rights must be terminated in order to permit the adoption, the court cited two situations in which this rule had been held not to apply, and concluded that the legislative intent interpreted in these situations can be applied to the present issue.[243] The exceptions are adoptions by a stepparent and adoptions by a minor father of his biological child.[244] In each of these situations, it was determined that the language of the statute that restricts the parental rights of the legal parent did not apply.[245] The court reasoned that the present cases were similar in that the child "'remain[s] within the natural family unit as a result of an intrafamily adoption.'"[246]

In his dissent in *In re Jacob*, Judge Joseph Bellacosa had great concern over judicial construct of a right to adopt.[247] Judge Bellacosa pointed to specific language in the statute that established the Legislature's "conclusion that a stable familial entity is provided by either a one-parent or a two-parent family when the concentric interrelationships enjoy a legal bond."[248] While the majority in *In re Jacob* had acknowledged that not all families consist of one mother and one father who are married to each other,[249] the dissent seems to advocate stripping non-traditional families of

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1992) (holding that a woman can adopt child of her lesbian life partner).

[239] N.Y. DOM. REL. LAW § 110 (McKinney's).

[240] *In re Jacob*, 660 N.E.2d at 399.

[241] *Id.* at 400.

[242] *Id.* at 403.

[243] *Id.* at 403-04.

[244] *Id.*

[245] *In re Jacobs*, 660 N.E.2d at 403-04.

[246] *Id.* at 403, (quoting *In re* Seaman, 583 N.E.2d 294 (N.Y. 1991)).

[247] *In re Jacob*, 660 N.E.2d at 407 (Bellacosa, dissenting).

[248] *Id.* at 408.

[249] *Id.* at 400.

access to the legal rights that will help them provide for the stable family environment it stated was desirable.

In contrast to those in New York, courts in Colorado and Wisconsin have refused to construe their state adoption statutes to allow second parent adoptions.[250] In these states, recent cases involved lesbian women wishing to adopt their life-partner's child or children.[251] Both states' courts refused to determine if the adoptions were in the best interest of the child, stating that there must first be a legal right to adoption before such analysis is needed.[252] In *In re T.K.J. and K.A.K.*,[253] the Colorado Court of Appeals stated that adoption is a purely statutory rule.[254] Because the statute refers to stepparent adoption rights explicitly for an individual married to the custodial parent, the court held that these rights cannot be extended to a "spousal equivalent."[255] The court pointed out that the family acknowledged it would stay together regardless of the legal status of the members towards one another.[256] What the court failed to recognize was the need for legal parent status to protect their ability to stay together. Writing in a separate concurrence, Judge Ruland acknowledged these concerns, and encouraged the state's General Assembly to address the issues raised by this decision.[257]

In the Wisconsin case, *In re Angel Lace M.*,[258] the Supreme Court of Wisconsin stated that the Wisconsin adoption statute[259] is to be liberally construed and that the best interest of the child is the key concern for the court.[260] The court also recognized that the statute is ambiguous as to

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[250] *In re* T.K.J. & K.A.K., 931 P.2d 488 (Colo. Ct. App. 1996); *In re* Angel Lace M., 516 N.W.2d 678 (Wisc. 1994).

[251] *In re T.K.J.*, 931 P.2d at 490; *In re* Angel Lace M., at 680.

[252] *In re T.K.J.*, 931 P.2d at 493; *In re* Angel Lace M., at 682-83.

[253] *In re* T.K.J. and K.A.K., 931 P.2d 488 (Colo. Ct. App. 1996).

[254] *Id.* at 491.

[255] *Id.* at 493.

[256] *Id.* at 491.

[257] *Id.* at 497-98.

[258] *In re* Angel Lace M., 516 N.W.2d 678 (Wisc. 1994).

[259] WISC. STAT. ANN. § 48.01, .81-.82 (2) (West).

[260] 516 N.W.2d at 681.

which children are eligible for adoption (i.e., whether one or both parents have to have surrendered parental rights for the child to be adoptable).[261] However, the court refused to interpret the statute such that a child is eligible for adoption provided that at least one parent has surrendered legal parental rights.[262] The court stated that holding as such would lead to the absurd result of extending standing to petition for adoption to complete strangers.[263] The court added in a footnote that although the statute does not clearly provide for the exception that the spouse of a legal parent may adopt the child provided that only one parent (the non-custodial parent) has surrendered parental rights, the court's holding that both parents must surrender legal rights to the child "obviously does not apply to stepparent adoptions."[264] It is highly questionable whether the Wisconsin court was analyzing the correct section of the adoption statute in this case. Rather than attempt to expand the definition of what children are eligible for adoption, perhaps the court should have looked to expand the definition of "stepparent" to include the life partner of the custodial parent.

IV. OBTAINING SECOND PARENT LEGAL RECOGNITION

There are many advantages to having two legal parents.[265] Among these are the security of contact with both of those parents after the break up of a relationship, or the ability to continue to live with one of those parents after the death of the other. Several courts, including the New York Court of Appeals have refused to provide for the custodial and visitation rights of a life partner who has served as a second parent to the

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[261] *Id.* at 682., WISC. STAT. ANN. § 48.81 (2) (West) (stating that "a minor whose parental rights have been terminated" is eligible for adoption).

[262] *In re Angel Lace M.*, 516 N.W.2d at 682-83.

[263] *Id.*

[264] *Id.* at 683.

[265] *See supra* notes 229-232 and accompanying text.

other partner's children.[266] The most common dynamic that courts have addressed is one where the life partners, typically lesbian women, agree to have a family together and one of the partners carries the child or children. The couple's relationship ends and a custody battle ensues. This section addresses the concerns of the "second" parent who lacks a legal right or responsibility to the child.

Because these second parents lack legal parent status, they have devised a number of theories to provide their parental status, including equitable parent status, equitable estopple, *in loco parentis,* and de facto parent.[267]

Under the equitable parent theory, a person is granted status equal to that of a legal parent if he or she fulfills a variety of the child's needs "and demonstrates that (1) he had physical custody of the child for an extended period, (2) his motive in seeking parental status is his genuine care and concern for the child, and (3) his relationship with the child began with the consent of the child's legal parent."[268]

This is different from the equitable estoppel theory under which one parent relies to his or her detriment on the other parent's action, such that the one parent becomes dependent on the other parent.[269] This theory has most often been used for the purpose of requiring a "non-legal" parent to pay child support as the biological parent relies on the support provided by the second parent.[270] The second parent can turn this around to say that if the responsibility to support is present, so must be the right to maintain contact with the child. Each of these two theories has been used

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[266] *In re* Alison D., 572 N.E.2d 27 (N.Y. 1991); Music v. Rachford, 654 So.2d 1234 (Fla. Dist. Ct. App. 1995); Nancy S. v. Michele G., 228 Cal. Rptr. 212 (Ct. App. 1991); Titchenal v. Dexter, 693 A.2d 682 (Vt. 1997) (stating that the court did not have jurisdiction to hear the request for visitation because the petitioner did not fit the statutory definition of parent).

[267] Delaney *supra* note 3, at 187.

[268] *In re T.L.*, 1996 W.L. 393521 *1, *2 (Mo. Cir. Ct. 1996).

[269] Polikoff, *supra* note 7, at 491.

[270] *Id.*; *Nancy S.*, 279 Cal. Rptr. at 217.

successfully in custody or visitation cases brought by a second parent.[271]

The equitable parent theory was accepted as a valid way to establish legal rights for a second parent in a recent Missouri Circuit Court decision.[272] In *In re T.L.*,[273] the court determined that the nonbiological parent fit the criteria for status as an equitable parent.[274] The court awarded physical custody to the biological mother, and legal custody to both parents, with generous visitation by the equitable parent.[275] The court acknowledged its duty to the child and refused to deny this child and others similarly situated the same rights provided to children of heterosexual marriages.[276]

Two trial courts have accepted the equitable estoppel theory of parenthood in cases involving a lesbian partner as second-parent.[277] The judge in one of these cases viewed the situation with the idea that he would have granted the biological mother financial support from the second parent; therefore, there was a legitimate relationship that should be maintained.[278]

The two theories that have been unsuccessful in attempts to gain legal parent status are de facto parent and *in loco parentis*. Under each of these theories, the parental rights and duties are applied to a person who has voluntarily supported or cared for a child.[279]

The California Court of Appeals in *Nancy S.*, addressed several

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[271] *In re* T.L., 1996 W.L. 393521 (applying the equitable parent theory); Sabol v. Bowling, No. CF-27,024 (Cal. Sup. Ct. Los Angeles Cty, Jan. 30, 1989) (applying the equitable estoppel theory); Carney v. Dianna, No. 89,191,039-CE 99, 949 (Baltimore City Cir. Ct. Jan. 11, 1990) (applying the equitable estoppel theory) (noted in Polikoff, *supra* note 7, at 491, 534-537).

[272] *In re* T.L., 1996 W.L. 393521.

[273] *Id.*

[274] *Id.* at *2

[275] *Id.* at *5-*7.

[276] *Id.* at *4.

[277] Sabol v. Bowling, No. CF-27,024 (Cal. Sup. Ct. Los Angeles Cty, Jan. 30, 1989); Carney v. Dianna, No. 89,191,039-CE 99, 949 (Baltimore City Cir. Ct. Jan. 11, 1990) (noted in Polikoff, *supra* note 7, at 491, 534-37).

[278] Polikoff, *supra* note 7, at 535.

[279] Polikoff, *supra* note 7, at 502; *Nancy S.*, 279 Cal. Rptr. at 216.

different parenting theories and denied legal parent status to a lesbian second-parent under each theory.[280] The first theory addressed was "de facto parent," under which the person takes on the parental role, helping fulfill the day-to-day needs of the child, including both physical and psychological needs.[281] The court held that while the lesbian life partner may fulfill this definition, this does not entitle her to custody and visitation unless it is clearly established that the biological parent is unfit.[282]

A second theory advanced by the partner is that she served *in loco parentis* to the children in question.[283] One who stands *in loco parentis* has voluntarily supported and cared for the child.[284] The court in *Nancy S.* refused to extend rights to the non-parent under this theory stating that is has never been used to provide rights to a non-parent equal to those of a parent.[285] The court further refused to apply the theory of equitable estoppel to this case, stating that this rule has not been used in California to award visitation or custody to someone other than a biological parent.[286] The court also briefly discussed the equitable parent theory, but stated that California courts have rejected this theory for providing parental rights.[287]

The hardships that may ensue for the family if the second parent is not granted legal status can be seen in the case of *McGuffin v. Overton.*[288] In *McGuffin*, two lesbian women lived together for eight years with one woman's children from a previous heterosexual relationship.[289] The boys' father had failed to develop a relationship with his sons and was remiss in his child support payments.[290] For these reasons, the mother had designated her partner as guardian of the boys in her will and had

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[280] *Nancy S.*, 279 Cal. Rptr. at 212.
[281] *Id.* at 216.
[282] *Id.*; *see also*, Titchenal v Dexter, 693 A.2d 682, 685 (Vt. 1997).
[283] *Nancy S.*, 279 Cal. Rptr. at 217.
[284] Polikoff, *supra* note 7, at 502.
[285] *Nancy S.*, 279 Cal. Rptr. at 217.
[286] *Id.* at 218.
[287] *Id.* at 218-19.
[288] 542 N.W.2d 288. (Mich. Ct. App. 1995).
[289] *Id.* at 289.
[290] *Id.*

delegated her parental rights to her partner through a power of attorney.[291] When the biological mother died, the father obtained an *ex parte* custody order.[292] The partner filed a challenge to this custody order, which the father appealed.[293] The partner who was not a legal parent of the children, was denied standing to appeal.[294]

Here, against the will of the mother, two children were taken from the home and the second parent they had known for eight years and placed with the father who had not developed a relationship with them.[295] The "parent" who had been with the boys for most of their lives was denied standing because she had no legal ties to the boys.[296] If the court had instead applied an equitable parent standard to establish standing, the partner should have been granted standing to appeal because she met the three criteria to qualify as an equitable parent. She lived with the children for an extended period of time, eight years.[297] Her motivation for seeking custody was concern for the boys.[298] Her relationship with the boys was started with the consent of the children's mother.[299]

V. CONCLUSION

Absent a showing of harm, it is in the best interest of a child to have and maintain a relationship with a parent who loves that child. This rule must hold, regardless of the race, gender, or sexual orientation of that parent. The Supreme Court has held in *Palmore v. Sidoti*[300] that a parent's and society's private biases should not play into a custody battle. Many courts confronted today with challenges to custody, visitation, and

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[291] *Id.*
[292] *Id.* at 288.
[293] *McGuffin*, 542 N.W.2d at 290.
[294] *Id.* at 291.
[295] *Id.*
[296] *See McGuffin*, 542 N.W.2d 288 at 292.
[297] *Id.* at 289.
[298] *Id.* at 289-90.
[299] *Id.* at 289.
[300] 466 U.S. 429 (1984).

adoption requests by gay and lesbian parents may not view the challengers concerns as private bias; however, they must be classified as such. There is strong, consistent evidence that children of gay parents fair at least as well as their peers raised by heterosexual families. Certainly today a court should not -- and based on *Palmore*, could not -- give merit to a parent's concern about stigmatization of a child raised by a racially mixed couple, or by a couple with different religious beliefs. This should hold true for concerns about children raised by two men or two women.

There are a variety of issues faced by gays and lesbians who want to parent. There are also a variety of resources available to them. Legal expertise in this area is important as the law changes constantly and varies greatly from state to state and from issue to issue. One must be prepared to face the unexpected. Courts that are intolerant to gays and lesbians in one facet of parental rights are liberal in another. Missouri has held against gay and lesbian parents in both custody and visitation decisions, yet it is one of the few states to have awarded visitation and legal custody to a nonbiological second parent. Likewise, while New York is in many ways highly tolerant to gays and lesbians, New York courts still fail these second parents.

As the number of gay and lesbian families increase, courts will be confronted with the reality of their existence and their issues. Education and acceptance are the key tools for improving the legal standing of gay and lesbian parents.

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